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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MICHIGAN, Petitioner

vs.

JAMES MILI ER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

Is the search of an automobile compartment, seizure of a suitcase from the seat and search of it justified as a search incident to arrest of the defendant and his companion.

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OTHER AUTHORITIES

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NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, III, Deputy Chief, Civil and Appeals, and ANDREA L. SOLAK, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on October 7, 1981. A Delayed Application for Leave to Appeal was denied by the Michigan Supreme Court on April 30, 1982 on the merits. A Motion for Rehearing was denied by the Michigan Supreme Court on June 16, 1982.

OPINIONS BELOW

The Michigan Court of Appeals in an opinion issued October 7, 1981 reversed the state trial court's dismissal of one count of a two count information and affirmed the dismissal of the second count on the grounds that the defendant's Fourth Amendment right against an unreasonable search and seizure was violated. This opinion is appended as Appendix A. An application for rehearing was held in abeyance in light of **New York v Belton,** _____ US _____; 101 S Ct _____ 69 L Ed 2d 768 (1981). This order is appended as Appendix B. The rehearing was denied on January 13, 1982. See order appended as Appendix C. On April 30, 1982 the Michigan Supreme Court denied an application for leave to appeal. This order is appended as Appendix D. On June 16, 1982 the Supreme Court denied the application for rehearing. This order is appended as Appendix E.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued October 7, 1981. The Michigan Supreme Court denied a delayed application for leave to appeal on June 16, 1982. The jurisdiction of this Court is invoked under 28 USC §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, shall not be violated and no warrants shall issue, but by probable cause, supported by oath, affirmation, and particularly describing the place to be searched, and persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws.

STATEMENT OF FACTS

Defendant was charged with carrying a concealed weapon and knowingly or intentionally possessing heroin. MCL 750.227; MCL 333.7403. At a pre-trial suppression hearing defendant's objections to the introduction into evidence of both the weapon (a revolver) and the controlled substance (two coin envelopes of heroin) were sustained. Subsequently, the trial judge quashed the information for lack of evidence. The People appeal the dismissal.

Testimony taken at the preliminary examination reveals that two police officers were on routine patrol in a marked police vehicle, proceeding north on Appoline Street at approximately 11:00 p.m. (R 4-5)* The police noticed on the left side of Appoline a man seated in the driver's seat of a parked, 1970 Oldsmobile, with the headlights off and the engine running (R 5). As the police passed the parked automobile the vehicle lights were turned on, the car moved southward two houses; and parallel parked again with its lights extinguished. (R 5) The officers then turned around and stopped behind the idling vehicle, on the north side of the street. (R 5) After several minutes of observation the idling automobile flashed its lights on and off twice. (R 6) The defendant entered the Oldsmobile on the passenger side, and the interior dome light came on. (R 7) The dome light was extinguished and the defendant and his companion drove away without turning on the headlights. (R 7) Fearing that the defendant might be involved in a breaking and entering of one of the neighborhood homes and realizing the danger of driving without headlights, the police decide to stop the vehicle. (R 7) Before the police could pull up to the vehicle and signal the driver to stop, the suspect vehicle pulled to the curb and stopped. (R 7) The driver and passenger simultaneously exited the vehicle, and defendant emerged carrying a briefcase. (R 7) Defendant, upon noticing the police who had parked ten to

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* Unless otherwise noted, all references are to the Preliminary Examination Transcript.

twelve feet behind the other vehicle, threw the briefcase to the passenger seat, closed the car door, and began to walk away. (R 8) Heeding a police order to halt, defendant returned and stopped alongside the passenger door, where Officer John Ruese was standing. (R9, 20) While the defendant was looking for identification, Officer Ruese shined his flashlight into the automobile and discovered a .32-caliber, nickel-plated revolver in an open side pouch of the briefcase. (R 9) Both defendant and driver were immediately arrested and placed into the patrol car. (R 24) The police then retrieved the briefcase from the unlocked car and searched its contents. (R 24) Found in a zippered part of the briefcase were two manila coin envelopes, later determined to have contained heroin. (R 10, 11)

REASONS FOR GRANTING THE WRIT

1A. THE SEIZURE AND SEARCH OF A CLOSED (ZIPPERED) SUITCASE INCIDENT TO THE LAWFUL ARREST OF THE DEFENDANT IS PERMISSIBLE.

The Court of Appeals properly found that police were justified in making an investigatory stop of the automobile (the defendant and his companion) and that the plain view observation of the gun justified its seizure and the arrest of the men. (Buff Sheet at 3.) The Court of Appeals rejected the People's argument that the search of the brief case was legitimately conducted as a limited protective search or pursuant to an impoundment and inventory. This Court clarified the issue of searches incident to the arrest of drivers or passengers of automobiles in **New York v Belton,** _____ US _____; 101 S Ct _____; 69 L Ed 2d 768 (1981). Subsequently, the Court of Appeals declined to grant rehearing based on the argument that the suitcase (a closed container) could be searched incident to a lawful arrest since it was within the passenger compartment. The Supreme Court denied review of the issue which is clearly governed by federal constitutional analysis; notwithstanding its policy to decide cases consistent with dispositive federal authority. **People v Drielich,** 400 Mich 559 (1977); **People v Kusowski,** 403 Mich 653 (1978).

1B. THE SEARCH OF THE AUTOMOBILE COMPARTMENT, SEIZURE OF THE SUITCASE AND SEARCH INTO THE SUITCASE IS JUSTIFIED AS A SEARCH INCIDENT TO THE LAWFUL ARREST OF THE DEFENDANT AND HIS COMPANION.

In rejecting rehearing the Court of Appeals implicitly found **New York v Belton,** _____ US _____; 101 S Ct _____; 69 L Ed 2d 768 (1981) inapplicable or distinguishable from the instant case.

In response to the order to show cause why **Belton** was not applicable, the defendant argued that the officers had

exclusive control of the brief case; thus the case was not an area within the defendant's immediate control at the time of the search.

This Court, in **Belton**, noted that searches incident to a lawful arrest were an exception to the warrant requirement and reasonable under the Fourth Amendment. **Belton**, 69 L Ed 2d at 774.

This Court recognized the divergent test forged by the jurisdictions in an attempt to define the scope of search incident to arrest as it relates to automobiles.

> When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his contitutional protection, nor can a policeman know the scope of his authority. While the **Chimel** case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when the area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." **Chimel, supra**, at 763, 23 L Ed 2d 685, 89 S Ct 2034. In order to establish the workable rule this category of cases requires, we read **Chimel's** definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. 69 L Ed 2d 774-5.

Belton reiterated the rationale that while the authority to search is predicated on the need to disarm an arrested person or to discover evidence, it is not necessary to show the same. 69 L Ed 2d at 775.

Finally, **Belton** refutes the notion that once the defendant is arrested or the item to be searched is seized, the police have obtained exclusive control obviating the application of the doctrine.

> The New York Court of Appeals relied upon **United States v Chadwick**, 433 US 1, 53 L Ed 2d 538, 97 S Ct 2476, and **Arkansas v Sanders**, 422 US 753, 61 L Ed 2d 235, 99 S Ct 2586, in concluding that the search and seizure in the present case were constitionally invalid.[3] But neither of those cases involved an arguably valid search incident to a lawful custodial arrest. As the Court pointed out in the **Chadwick** case, "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 US, at 15, 53 L Ed 2d 538, 97 S Ct 2476. And in the **Sanders** case, the Court explicitly stated that it did not "consider the constitutionality of searches of luggage incident to the arrest of its possessor." 69 L Ed 2d at 776.

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[3] It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 NY 2d, at 451, 429 NYS2d 547, 407 NE2d 420. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

The Michigan Court of Appeals found the investigatory stop and probable cause based arrest to be valid and lawful, Buff Sheet at 3; thus the search of the brief case which was in the compartment of the car in which the defendant had been a passenger just before he was arrested was proper as it was within an area which as a **matter of law** is "within the arrestee's immediate control." 69 L Ed 2d at 776. The Court of Appeal's opinion directly conflicts with the **Belton** rule and is therefore erroneous.

CONCLUSION

It is respectfully submitted that for the above reasons, stated this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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